IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO. 35

UNITED STATES OF AMERICA, *Petitioner*

v.

R. P. SCOVIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the Supreme Court of South Carolina in this case is reported at 78 S. E. 2d at Page 277.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered October 26, 1953. Petition for certiorari was filed on March 24, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

We agree with petitioner that two questions are presented by this petition for Certiorari. However, we think they are more accurately stated as follows:

ONE: Whether the priority accorded claims of the United States against the assets of an insolvent debtor by R. S. 3466 is defeated by a landlord's lien for rent arrears created by state law, where the landlord has, prior to appointment of receiver, caused to be issued and levied a distress upon the property of the insolvent.

TWO: Whether the lien accorded the United States for unpaid taxes by Section 3670 of the Internal Revenue Code is rendered subordinate to a landlord's lien recognized by state law and perfected by distress because notice of the tax lien was not filed until after the landlord's lien was perfected.

STATUTES INVOLVED

The pertinent provisions of the statutes of United States and of the State of South Carolina involved are printed in petitioner's appendix on Pages 13 to 16.

STATEMENT

The statement as found in petitioner's brief is adopted herein.

REASONS FOR REFUSING THE WRIT

ONE: There can be no question but that R. S. 3466 (31 USCA 191) gives debts due the United States by an insolvent priority over general creditors of the insolvent, and also, priority over lien creditors where the lien is not perfected or specific. This rule was fully recognized by the Master who first heard the case (R-5), the Circuit Judge to whom it was appealed (R-9-10-11) and the Supreme Court of South Carolina in its opinion by Mr. Justice Taylor (R-13).

However, it was held by all of these tribunals that in this case the landlord's lien was perfected and specific as of the time

of the appointment of the Receiver. (R-4, R-10, R-13).

The Government in no way excepted to that finding in either its appeal to the Circuit Court or to the Supreme Court of South Carolina (R-11). Based upon the Transcript of Record in that court, agreed to by both the Government and the landlord, it was believed that the specificity and perfection of the landlord's lien was not in issue; only the question of its priority, assuming, as was proper in the absence of an appeal thereabout, it was settled that the landlord's lien was perfected. The first intimation to the contrary was contained in the Government's printed argument in the Supreme Court of South Carolina, wherein the contention was made that the landlord's lien was not perfected and specific.

Questions not raised by the exception cannot be argued in or considered by the Supreme Court of South Carolina. *Nalley v. Metropolitan Life Ins. Co.*, 182 S. E. 301, 178 S. C. 183. We therefore respectfully submit that the question of whether or not the landlord's lien was specific and perfected as of the time of the appointment of the Receiver was not before the Supreme Court of South Carolina, and thus cannot properly be before this Court.

If, however, for the purpose of argument we concede that this question is properly before the Court, it is clear that here the landlord's lien was specific and perfected.

The procedure for distress in South Carolina is statutory and is quite different from common law distress. Unlike common law distress, the landlord does not issue the distress himself, but it is issued by a judicial officer, a Magistrate, upon the filing of an affidavit by the landlord of the amount of the unpaid rent. Section 41-151 of the *Code of Laws of South Carolina for* 1952.

Again, unlike common law distress the landlord is not allowed to go upon the demised premises and seize whatever chattels he finds subject to distraint. Instead, the judicial officer issuing the distress directs the sheriff or a constable to go upon the premises forthwith and demand the rent. Upon

failure to pay, this officer of the law distrains upon sufficient of the chattels thereon to satisfy the unpaid rent. The officer then gives the tenant a list of the property distrained together with a copy of the distress warrant. Section 41-153, *Code of Laws of South Carolina for* 1952.

All of this was done in the present case and the tenant was thereby divested of possession and title to the property distrained.

The Government argues the taxpayer was not divested of possession because the tenant has five days under the South Carolina statute to free his property from the lien of the distress by posting a bond in double the amount of the claimed rent. Section 41-160, *Code of Laws of South Carolina for* 1952. Petitioner has clearly confused a right to release from lien by substituting acceptable security for the property upon which the lien has attached, with the right to possession. These are two separate and distinct things and the right to substitute security for distressed property in no way impugns the perfection of the lien.

The Government argues the lien could not be specific because the distress was upon all of the assets of the taxpayer. This argument is based upon *United States v. Gilbert Associates,* 345 U. S. 361, 73 S. Ct. 701, where it was said:

> "In claims of this type, 'specificity' requires that the lien be attached to certain property by reducing it to possession . . ."

There can be no uncertainty in "all the assets" of the tenant, and it is hard to perceive how possession of those assets could be more effectively reduced to possession than by padlocking the premises.

The Government argues that the landlord could not have acquired possession since the Receiver, upon his appointment, took over all of taxpayer's assets, and the landlord's claim is being asserted against the proceeds of the Receiver's sale. This does not follow at all since the possession of the Receiver was with the consent of the landlord, who merely agreed to forego

the foreclosing of his perfected lien by sale as provided for in the statute, so that all priorities of liens could be determined in the receivership proceedings. The Order appointing the Receiver, of course, as is customary in such cases, enjoined any and all further legal proceedings against the insolvent except in the receivership proceeding and the landlord's action in not foreclosing his lien perfected by distress was perfectly natural, was in no way inconsistent with his perfected lien, and can give no comfort to petitioner.

TWO: We think it may safely be said that the Government's tax lien arising by virtue of Section 3670 was, prior to filing of notice, nothing more than a general, inchoate lien. *United States v. City of New Britain*, 374 U. S. 81, 74 S. Ct. 367. We also think it has been amply demonstrated that the landlord's lien was fully perfected and specific prior to the filing of such notice, and prior to the appointment of the Receiver.

This case is considerably different than *United States v. City of New Britain*, supra, where the Court had before it the question of the priority of two statutory tax liens; that of the United States and that of the City of New Britain. The Court, of course, held that the State of Connecticut could not by statute create a tax lien superior to the tax lien of the United States without the consent of the Congress. Here we have no South Carolina statute attempting to give a superior position to a state tax lien at the expense of the Federal Government. Instead, we have a landlord's lien recognized since the earliest days of the common law, and affected by the statutory law of South Carolina only in an effort to make its enforcement fairer and more equitable from a procedural standpoint.

Here we have a landlord who extends credit to his tenant. The tenant fails to pay the rent due for February. The landlord could immediately distress for this past due rent. A check of the public records would reveal no federal tax lien which would be paramount to his landlord's lien. Secure in the knowledge that his lien is a first lien against all the chattels of his tenant, he is tolerant of his tenant. He does not immed-

iately close him up and put him out of business. Instead, he extends him further credit for March and a portion of April. When finally it becomes evident the tenant will not or cannot pay the agreed upon rent, he converts his inchoate landlord's lien into a specific and perfected lien by distress. Why then is he not a "purchaser" within the meaning of the Section 3672 as the Master, the Circuit Judge and the Supreme Court of South Carolina held?

Petitioner advances no reason why not except the bald, unsupported statement that the landlord under the facts of this case does not come within any of the exceptions granted by Section 3672.

In *National Refining Co. v. United States*, 160 F. (2d) 951, the Court of Appeals for the 8th Circuit said:

> "We think it is safe to say that one who for a valuable present consideration, acquires property or an interest in property is a 'purchaser' within the meaning of 26 USCA Int. Rev. Code, 3672."

The landlord gave consideration by the use of the premises (especially after default in payment of the rent) and acquired an interest in the specific property by distress before the Government saw fit to give notice of its secret lien. Incidentally, it is appropriate to point out that the Government saw fit to keep its lien secret for some thirteen months. Certainly, in view of such dilatory action on the part of the Collector of Internal Revenue the Government is in no position to complain.

In *Hawkins v. Savage*, 110 F. Supp. 615, it was stated:

> "Section 3672 was enacted to protect what are commonly known as innocent purchasers for value, the word 'purchasers' embracing all those classes of persons who deal in the property of a debtor while other and secret liens against the property may exist."

Crawford Co. v. L. Leopold and Co., 70 N. Y. S. (2d) 183, affirmed 297 N. Y. 884, 79 N. E. (2d) 279; *Grossman v. City of New York*, 66 N. Y. S. (2d) 363, *United States v. Rosebush*,

45 F. Supp. 664 all seem to be authority for the landlord's position in this case.

The landlord has already been long delayed and put to great expense in order to secure that to which he is rightly entitled. Only $750.00 is involved. The decision below correctly and fairly decided the issues presented. It in no way conflicts with any prior decisions of this Court. That decision will in no way embarrass the Government in the collection of its revenues. It may compel the Director of Internal Revenue to be slightly more diligent in giving notice of the lien brought about because of unpaid federal taxes but that is no burden and no reason for this Court granting the petition for writ.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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